Before the
Federal Communications Commission
Washington, D.C., 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
A National Broadband Plan for Our Future	)	**GN Docket No. 09-51**
	)	
	)	

ONCOR ELECTRIC DELIVERY COMPANY LLC'S REPLY COMMENTS

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October 4, 2010

EXECUTIVE SUMMARY

Oncor previously noted that the attaching entities have presented "little to no real evidence that there is either a problem with access for broadband deployment or that pole attachment reform will achieve the Commission's stated goals."[1] Other pole owners (including ILECs) noted the same glaring deficiencies. After voluminous Initial Comments, the record for reform has not improved. The various attacher comments either: (a) make broad-sweeping allegations about make-ready problems with no specific evidentiary support whatsoever; (b) play a citation shell game that never uncovers real-world facts; or (c) attempt to amplify very isolated anecdotes that fail to reflect a common, much less systemic, deficiency in the current regulatory framework.

Since the enactment of the 1996 Act, cable and telecommunications services have evolved and expanded at unprecedented levels – through billions of dollars of investment. From the attachers' perspectives, the current pole attachment regime can be characterized ***honestly*** as nothing short of a resounding success. The regulations were designed to be "favorable" to attaching entities and attaching entities have worked them for everything they are worth.[2] The handful of atypical bumps in the road claimed by a vocal minority of attachers, as compared to years of undeniable success, does not justify the controversial, litigation-intensive, piecemeal and *ultra vires* reform set forth in the FNPRM. The Commission should do no more harm to pole owners and reject the Proposed Rules.

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[1] Oncor Initial Comments, p. 2. When generally referring to "Initial Comments" throughout these Reply Comments, Oncor is referring to the FNPRM Initial Comments filed by various parties in WC Dkt. No. 07-245, GN Dkt. No. 09-51, on August 16, 2010.

[2] For example, Congress called the Cable Rate a "beneficial rate" intended to "spur the growth of the cable industry, which in 1978 was in its infancy." H.R. Rep. No. 104-204(I), at 91-92 (1995), *reprinted in 1996* U.S.C.C.A.N. 10, 58; *see also* S. Rep. No. 95-580, at 12-14 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 120-23.

The linkage between pole attachment regulation (whether access or rate-related) and broadband deployment is similarly suspect and unsupported. There is neither logic nor evidence to support the notion that pole attachment protocols are truly an impediment to broadband deployment, or that pole attachment reform will further broadband deployment.

Oncor urges the Commission to strike the right balance. As the bulk of Initial Comments establish, the Proposed Make-Ready/Access Rules (1.1420, 1.1424, 1.1426(b)(1)-(3) and 1.1428) and the Proposed Approved Contractor Rules (1.1402, 1.1422 and 1.1424) are outside the Commission's statutory authority, attempt to fix problems that do not exist, and are inconsistent with an electric utility's right to deny access pursuant to 47 U.S.C. § 224(f)(2). Most importantly, these Proposed Rules would impede the abilities of pole owners to maintain safe and reliable networks and meet state-imposed obligations as electric service providers.

Finally, the Commission lacks authority to accept the proffered "reinterpretation" of the Telecom Rate. There is no ambiguity in the Act. Congress put in place a cost-sharing methodology that focuses on pole ***space*** and not pole ***attachments***.[3] The creative (and result-oriented) "cost-causer" model distorts the statute and is *ultra vires* for the Commission.

Oncor supports the Commission's intent to encourage further broadband deployment. Broadband deployment must yield, however, to the electric utility pole owners' focus on maintaining safe and reliable distribution networks. The Proposed Make-Ready/Access Rules and Proposed Approved Contractor Rules should be rejected.

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[3] 47 U.S.C. §§ 224 (c)(2)-(3).

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REPLY COMMENTS

Oncor Electric Delivery Company LLC ("Oncor") respectfully submits these Reply Comments regarding certain aspects of the Further Notice of Proposed Rulemaking (*Implementation of Section 224 of the Act; A National Broadband Plan for Our Future; Proposed Rule*) ("FNPRM") in the above-referenced docket.[4]

I. THE RECORD DOES NOT SUPPORT THE PROPOSED POLE ACCESS RULES.

Cutting through the make-ready comments, two facts are clear. First, the Commission has no general authority over *access* issues pursuant to Section 224(f)(2).[5] Instead, such issues must continue to be addressed on a case-by-case basis in accordance with the established complaint procedures[6] – a process even some attachers admit has "historically worked well."[7]

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[4] Oncor stands by the entirety of its Initial Comments. These Reply Comments respond to select issues and arguments raised in the Initial Comments filed by others. Oncor's silence on any issue does not indicate agreement therewith. Oncor also adopts and incorporates by reference, as if fully set forth herein, the Reply Comments of the Edison Electric Institute and the Utilities Telecom Council.

[5] *See* Oncor Initial Comments, pp. 16-19; *see also, e.g.,* TWC Initial Comments, p. 8 ("[C]able operators cannot compel a utility to create 'surplus' pole space for their use."); Alliance for Fair Pole Attachment Rules ("AFPAR") Initial Comments, pp. 25-36; EEI/UTC Initial Comments, pp. 2-3.

[6] *See* Oncor Initial Comments, pp. 16-19; s*ee also, e.g.,* AFPRA Initial Comments, pp. 9, 37-38, 50-54; Coalition of Concerned Utilities Initial Comments, p. 15; EEI/UTC Initial Comments, pp. i-iii, 2-5; CenturyLink Initial Comments, pp. 30-32; Idaho Power Initial Comments, pp. 3-4.

[7] *See* Charter Initial Comments, p. v (The Commission's "existing three-pleading complaint procedure . . . has historically worked well . . ."). Oncor agrees. If an attacher chooses to not avail itself of the complaint procedure, only it is to blame. For example, Fibertech claims (without support) that "[w]hile [it] has deployed approximately 6,000 miles of network in the past decade, pole licensing delays from pole owners has stunted the growth of its networks and diminished its ability to provide competitive service." Fibertech Initial Comments, p. 1. If true, then shame on Fibertech – it should have filed complaint proceedings instead of trying to let the exceptions it has allegedly experienced change the rules for everyone.

Second, there is a complete lack of record evidence that the Proposed Make-Ready Access Rules are either warranted or would enhance broadband deployment. To the contrary, the submissions highlight the lack of a need for impractical, *ultra vires,* one-size-fits-all access regulation.

A. The Commission Cannot Force Pole Owners to Perform Make-Ready – Much Less Tell Them How Fast to Do It.

The Commission cannot force upon pole owners "build-out" (a/k/a make-ready) rules mandating capacity expansion. Proposed Rules 1.1420, 1.1424, 1.426(b)(1)-(3) and 1.1428 attempt to do just that and, as such, violate electric utilities' right to deny access under Section 224(f)(2) and related binding legal precedent.[8] Nothing set forth in any of the Initial Comments rebuts this fundamental jurisdictional deficiency. The Commission's lack of authority to impose "build-out" (make-ready) timelines on pole owners was reinforced by the Eleventh Circuit's holding in *Southern Co. v. FCC*, which overturned a Commission ruling that required utilities to expand capacity to meet requests for new attachments.[9] If the Commission cannot compel pole owners to create surplus pole space, it certainly cannot tell them how to do it, how fast to do it, or dictate the consequences for a failure to comply (such as penalties or forced use of approved contractors).

In the face of the Act's clear language and the Eleventh Circuit's holding, even the most vocal third-party attachers admit that "insufficient capacity" can exist (triggering an electric utility's rights under Section 224(f)(2)) and that "cable operators cannot compel a utility to create

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8 *See* Oncor Initial Comments, pp. 16-19.

9 *Id.* at pp. 17-18 (citing and quoting *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002)) ("Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers. . . . By attempting to extend those generally applicable rules into an area where the statutory text clearly directs that they not apply, the FCC is subverting the plain meaning of the Act.").

'surplus' pole space for their use."[10] Similarly, in discussing the Oregon model for dealing with unauthorized attachments, Comcast asserts:

> It is also questionable whether the Commission has the jurisdiction to impose and enforce the kinds of obligations on utilities that are key to Oregon's far reaching regime. For example, ***it is not apparent that the Commission can dictate specific utility pole inspection schedules and practices in all Commission regulated states or that the Commission can (or would) establish specific pole safety rules and require both attachers and pole owners to comply***.[11]

The attachers cannot have it both ways. That is, they cannot question the Commission's authority to regulate in the world of unauthorized attachments, yet ask the Commission to do that very thing in the context of make-ready.

B. The Record is Devoid of Evidence Establishing a Real, Much Less Systemic, Problem with Pole Access.

Oncor previously noted that attaching entities have presented "little to no real evidence that there is either a problem with access for broadband deployment or that pole attachment reform will achieve the Commission's stated goals."[12] Other electric utilities noted the same glaring deficiency.[13] Even most commenting ILECs – entities seeking some pole attachment

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[10] TWC Initial Comments, p. 8.

[11] Comcast Initial Comments, p. 39 (emphasis added); *see also* NCTA Initial Comments, p. 48 ("The Commission does not have the authority or manpower to institute a similarly broad inspection program in all 30 non-certified states.").

[12] Oncor Initial Comments, p. 2.

[13] *See, e.g.,* APPA Initial Comments, pp. iv, vi ("The American Public Power Association and the public power utilities that it represents believe that several of the Commission's pole attachment proposals will not only fail to advance the purported goals of the Commission to expand broadband availability, but will actually set them back. . . . APPA similarly questions the Commission's assumption that existing processes related to pole access are not working. Again, while the Commission provides anecdotal evidence of delays experienced by some cable and telecommunications providers, it has not presented any evidence of widespread, unreasonable delays in the pole attachment process."); *Id.* at p. 17 ("Apart from anecdotal statements, there have been no empirical studies submitted in the record that

reform – agree that the record is devoid of real evidence and does not demonstrate a systemic problem.[14]

Despite over 950 pages of initial comments filed by 25 different entities supporting pole attachment reform of some kind (including several large industry associations), the record purporting to justify reform has not improved. Nearly one-half of the attaching commenters

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demonstrates that pole costs alone significantly impact broadband business decisions on a pervasive basis. In the experience of APPA's members, pole attachment costs have not been identified as a deterrent to the provision of broadband networks."); EEI/UTC Initial Comments, p. 12 ("The investor-owned utilities typically serve the larger and more populated communities, most of which currently have facilities of existing cable television system or telecommunications carriers attached to their poles. . . . Because a large portion of the unserved population live in areas that would not be affected by the proposed rules, the relationship between the proposed pole attachment regulations and the goal of promoting broadband deployment is remote."); Exelon Initial Comments, pp. 1-2 ("In addition, the Exelon EDCs would point out that none of the areas to which they provide electric service are listed as "areas unserved by broadband" in the Commission's own Sixth Broadband Deployment Report. To the contrary, customers in the Exelon EDCs' service areas, which center around two of the larger metropolitan areas in the country, Philadelphia and Chicago, already have a variety of broadband options - ILEC DSL services, traditional cable television services, satellite services, and a number of wireless broadband options. The Exelon EDCs, therefore, are concerned that, for their customers, the Commission's proposed rules would only increase the pole attachment related costs that they would have to finance though their electric rates - essentially for no purpose. The Exelon EDCs suspect that the same may also be the case for the customers of a large number of other investor-owned utilities who would be affected by the Commission's proposed rules. Because of this, the Exelon EDCs suggest that the Commission carefully consider whether application of its proposed rules to all investor owned utilities subject to its jurisdiction is truly the best course. If the Commission truly believes that these rule changes are necessary to bring broadband services to those who currently do not have those options, then the more economic course, from a public policy perspective, would seem to be to limit the application of those rules to the areas which the Commission has already identified as unserved in that regard.").

[14] *See, e.g.*, AT&T Initial Comments, p. 19 ("[M]ost of the allegations of problems with access to poles amount[] to conclusory statements without underlying fact. . . . There is in short a considerable lack of probative evidence to show that there are systemic problems with access to poles. . . ."); Qwest Communications Initial Comments, p. 7 ("Qwest has been providing access to its poles for years. It therefore has a well-established process that provides such access in a reasonably timely manner while ensuring compliance with safety standards and protection of the facilities of all attachers on a pole."); Verizon Initial Comments, p. 43 ("In Verizon's experience, the Commission's current complaint process is effective in resolving pole attachment disputes. Any pole attachment complaints that have been brought against Verizon were resolved without a final decision by the Commission.").

make broad-sweeping allegations about make-ready problems with no specific evidentiary support whatsoever.[15] Many others attempt to create a false appearance of support by shell-game citation to either other commenters or various sections of the FNPRM – none of which are supported by actual facts.[16] Only eight commenters (even going back to the NPRM) appear to make an attempt to identify an actual experience.[17] Even here, however, the evidence is very limited, clearly isolated, often faults anonymous pole owners and a far cry from reflecting a systemic problem.

The Act has been in place for thirty-two years. There are more than 3,273 traditional electric utilities in the United States, only 210 of which (6.4%) are investor-owned utilities subject to Commission jurisdiction.[18] Yet, since the 1996 Act's enactment, cable and

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[15] TW Telecom and Comptel Initial Comments, p. 4 ("[u]tilities often engage in conduct that has been deemed unlawful by the FCC"); NTCA Initial Comments, p. 11 ("The Associations report difficulties in working with the larger utilities in reaching agreement on prompt pole access, especially due to the absence of a federal make-ready timeline.").

[16] *See, e.g.,* TWTC and Comptel Initial Comments, p. 10 ("As TWTC and others have explained, pole owners take many months to complete make-ready work and often refuse to agree to *any* deadlines in pole attachment contracts"); Sunesys Initial Comments, p. 3 ("As the Commission found, the record in this proceeding includes many examples of delay in make-ready work in states without make-ready timelines . . .").

[17] *See, e.g.,* Knology Comments, WC Dkt. No. 07-245 (NPRM), pp. 20-21 (March 7, 2008) ("Perhaps the greatest enemy of an attacher in the make-ready phase is delay. Utilities are notoriously slow during the make-ready process and lack any incentive to process requests efficiently and quickly." – citing one experience with one utility); ACA Initial Comments, p. 8 ("ACA is aware of *an instance* where the make-ready process has still not been completed more than two years after an operator sent an application to a pole owner.") (emphasis added); NTELOS Initial Comments, p. 5 ("[T]he extant record in this proceeding is studded with similar accounts of pole attachment projects which have stretched to many times their originally planned lengths, resulting in loss of customers, and in some cases, forming significant barriers to entry in certain regional markets." – citing 1 fiber route running through Princeton, WV; while Oncor is not certain what "studded with similar accounts" is supposed to connote, it seems that the few examples provided do not fit the bill).

[18] http://www.eia.doe.gov/electricity/page/prim2/toc2.html. Thus, 3,063 electric utility pole owners (or 93.6%) operate without Commission pole attachment jurisdiction (and would be unphased by the FNPRM's proposals).

telecommunications services have evolved and expanded at unprecedented levels – through billions of dollars of investment.[19] As set out in many sets of Initial Comments, filed by both third-party attachers and pole owners, broadband services are flourishing under the current, limited Commission access regulation.[20] In Texas, where Oncor owns poles and provides electric service, 97% of households have access to terrestrial fixed broadband service at rates of 768 kbps downstream and 200 kbps upstream (excluding mobile and satellite services).[21] With mobile broadband service included, 99% of Texas households have access to broadband services.[22] This statistic is not unique to Texas.[23] To the extent urban development has outpaced rural expansion, it has done so under the existing regime with little to no FCC complaint activity and on pole networks that are typically more congested than rural pole networks.

AT&T correctly points out that "[t]here is in short a considerable lack of probative evidence to show that there are systemic problems with access to poles or the enforcement

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19 *See, e.g.,* Charter Initial Comments, p.1 (noting that since 2000 it has spent over "$8 billion to rebuild its legacy analog plant and deploy broadband . . . to its largely rural subscriber base"); Comments of CTIA – The Wireless Association ("CTIA"), *In the Matter of High-Cast Universal Service Support,* WC Docket No. 05-337, *et al.,* p. ii ("Wireless networks have evolved into powerful drivers of economic development and economical means of assuring broadband deployment in rural areas."); CTIA Initial Comments, p. 3 (reporting that wireless carriers invested a combined average of $22.8 billion per year in equipment and infrastructure in 2001 through 2008, with more than $25 billion in 2008 alone); Comcast Initial Comments, p. 5 ("[C]able television industry has invested over $160 billion to extend broadband services to virtually all homes passed by cable television companies nationally."); T-Mobile Initial Comments, p. 4 (declaring that they are "on track to deliver high speed mobile broadband [service] covering 185 million people in the United States" by the end of 2010); *see also* NCTA Initial Comments, WC Dkt. No. 07-245 (NPRM), p. 1 (March 7, 2008) ("Without any government funding, cable operators have been able to offer high capacity broadband Internet access to over 92 percent of the country.").

20 *Id.*; *see also* Oncor Initial Comments, pp. 5-7; Florida IOU Initial Comments, p. 2; Exelon Initial Comments, p. 1.

21 *See* Oncor Initial Comments, pp. 5-6.

22 *Id.*

23 *Id.* at pp. 6-7.

process that require a wholesale revamping of the Commission's pole attachment enforcement rules."[24] Even more compelling, Time Warner Cable ("TWC"), a prominent attacher on Oncor's system and one of the more vocal in this proceeding, admits that the alleged make-ready problems are exaggerated and atypical:

> While the Commission's [make-ready timeline] proposal may alleviate the ***most egregious and troubling*** utility delays, it would establish baselines based on outlier cases that ***are out of step with the far shorter timelines that TWC currently enjoys for typical permit applications***.
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> ***In the majority of cases,*** TWC's engineering and operational teams are able to work with their counterparts at the utility to ensure that simple attachment applications are processed quickly and make-ready work is completed promptly.[25]

TWC goes so far as to state that "[t]he Commission's [make-ready] proposal would sanction delays that ***currently do not exist in most cases***."[26]

TWC's acknowledgement is borne out by the real-world data. For example, from April 24, 2008 to May 29, 2008, TWC submitted 1,858 poles for permitting to Oncor.[27] Oncor averaged 40.5 days for processing (the date a permit is received through the date Oncor sends a cost letter to attacher).[28] Similarly, as part of TWC's cell tower backhaul projects, from July 3, 2008 to August 16, 2010, TWC submitted 19,430 poles for permitting.[29] Oncor averaged 30

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24 AT&T Initial Comments, p. 19.

25 TWC Initial Comments, pp. ii, 17 (emphases added).

26 *Id.* at p. 17.

27 *See* Declaration of Karen Flewharty, ¶ 5 (attached hereto as Exhibit A).

28 *Id.*

29 *Id.*

days for processing during the 2008 and 2009 timeframe.[30] From January 1, 2010 to August 31, 2010, TWC submitted 3,474 poles for permitting.[31] Oncor averaged 39 days for processing.[32] Collectively, from January 1, 2010 to August 31, 2010, Oncor has received 14,836 poles for permitting.[33] Oncor has averaged 39 days for processing during 2010.[34] Other electric utilities continue to experience similar successful results.[35]

The rhetoric surrounding make-ready issues is a manufactured crisis. A handful of atypical bumps in the road from a vocal minority, as compared to years of undeniable success, do not justify the controversial, litigation-intensive, piecemeal and *ultra vires* reform proposal in the FNPRM. As the CTIA has previously urged, the Commission "should not adopt new rules based on" false "assumption," "fear" or simple "alleged harms."[36]

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30 *Id.*; *see also* Oncor Initial Comments, p. 20 (reporting that in 2009 through year-to-date 2010, Oncor has responded to permit applications on average within 36 days).

31 Flewharty Decl. at ¶ 5.

32 *Id.*

33 *Id.*

34 *Id.*

35 *See, e.g.,* Idaho Power Initial Comments (reporting that since 2006, it has processed an average of 220 pole attachment requests per year (each involving an average of 13 pole attachments) and that straightforward requests are processed and make-ready work is completed with 45 days); AEP Initial Comments, p. 6 (reporting that its seven operating companies with the most attachment applications in 2010 completed surveys in an average of under 33 days and completed make-ready in an average of approximately 48 days); Florida IOU Initial Comments, p. 2 (FP&L reported that it completed make-ready work associated with an attachment request involving more than 200 line miles before the existing ILEC attacher had even commenced its make-ready work); Ameren, CenterPoint and Virginia Electric and Power Initial Comments, p. 4 (reporting that they usually complete all survey and make-ready for wired attachments within the FCC timelines, with delays most often occurring when an attaching entity fails to submit a proper application or some other circumstance beyond the utility's control). *See also The Problem With Pole Attachments, A Survey Report By UTC (2007)*, p. 13 (noting that among the eighty-five responding pole owners, 81% of all applications are processed within 45 days).

36 Reply Comments of CTIA, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, pp. 2-3 (August 12, 2010).

C. The Reform Proponents Have Failed to Show Any Linkage Between Pole Attachment Regulation and Broadband Deployment.

The linkage between pole attachment issues (whether access or rate-related) and broadband deployment is extremely suspect. There is simply no logic or evidence to support the notion that pole attachment protocols are an impediment to broadband deployment, much less the notion that pole attachment reform will further broadband deployment. Simply saying so – no matter how repetitive – does not make it so.

Again, the Initial Comments of the attaching entities are telling in this regard. The American Cable Association (representing over 900 *rural* cable companies in 49 states and, therefore, presumably equipped with reams of evidence) proffers no data to support any connection between pole attachment issues and broadband deployment. Instead, on this critical analytical issue, they merely speculate that pole attachment issues ***could potentially*** result in delay.[37] Similarly, AT&T says no more than pole attachment rate issues "***can*** affect their business case for deploying broadband infrastructure" and "***most likely*** has a real and detrimental impact" on deployment.[38] These "may" and "might" positions - coupled with a complete lack of statistical or analytical linkage - are simply not the stuff of overreaching reform;[39] especially where other attachers boast that they have had ***"highly successful"***[40] experiences in deploying

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[37] ACA Initial Comments, p. 7 (emphasis added).

[38] AT&T Initial Comments, pp. 1-2 (emphasis added).

[39] *See, e.g., Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1019-20 (D.C. Cir. 1987) ("Neither *Wisconsin Gas* nor any other case of which we are aware supports an industry-wide solution for a problem that exists only in isolated pockets.").

[40] Comcast Initial Comments, pp. 3-5 (emphasis added) ("Since 1996, the cable television industry has invested over $160 billion to extend broadband services to virtually all homes passed by cable television companies nationally. This investment has enabled innovation in new technologies like DOCSIS 3.0, which will permit cable companies like Comcast to offer broadband speeds up to 100 Mbps or more. Comcast deployed DOCSIS 3.0 to 80% of its footprint by the end of 2009 (over 40 million households), and continues to extend the service

broadband and that "95% of Americans (290 million) have access to [broadband]."[41] The Commission should take a hard look at the actual record evidence in this proceeding. As noted above, the record does not establish a real problem at all, much less a systemic problem. The error is compounded because the FNPRM proposes extensive, industry-wide rule changes merely assuming the problems exist and that the proposed means will further the end goal. Heavy-handed regulatory reform based on such a thin (or non-existent) record is the hallmark of arbitrary and capricious rulemaking.

The Federal Courts of Appeals have recognized that isolated problems do not justify industry-wide "solutions." In *Associated Gas Distribs. v. FERC*, for example, the D.C. Circuit held that FERC had "failed to develop an adequate rationale in support of CD [contract demand] reduction."[42] FERC attempted to impose a general industry-wide solution for a problem that existed only "on some systems." In response to FERC's argument that it had the power to make generic determinations, the D.C. Circuit wrote:

> True but irrelevant. Neither *Wisconsin Gas* [*Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985),] nor any other case of which we are aware supports an ***industry-wide solution for a problem that exists only in isolated pockets***. In such a case, the disproportion of remedy to ailment would, at least at some point, become arbitrary and capricious.[43]

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within its footprint. The cable industry's aggressive broadband deployment also has enabled cable's VoIP service to be the first facilities-based competition for residential voice service. Cables' VoIP service is projected to have directly and indirectly benefited consumers and small businesses by over $100 billion between 2007 and 2011.").

41 Comcast Initial Comments, p. 8 (emphasis added).

42 824 F.2d 981, 1018 (D.C. Cir. 1987).

43 *Id.* at 1019 (emphasis added).

Stated alternatively, an agency "may rely on 'generic' or 'general' findings of a ***systemic problem*** to support imposition of an industry-wide solution,"[44] but "***proportionality*** between the identified problem and the remedy is the key."[45]

Here, the Commission would fail each prong of the *Associated Gas* standard. First, the record does not establish a systemic problem or a "wholly dysfunctional" industry.[46] Second, it is impossible for the Commission to implement an industry-wide solution – in fact it cannot even come close (given the Commission's own acknowledgement of the limitation on its jurisdiction).[47] Finally, there is simply no logical or statistical link between this non-existent problem and broadband deployment, especially to rural areas.[48] There is, therefore, a complete lack of proportionality between the Commission's heavy-handed proposed remedy and a non-existent ailment. Stated more aptly, the Commission is proposing dangerous, untested medicine where there is no reasonable diagnosed disease. With this record, and considering all circumstances, the Commission should listen to Oncor and the other electric utility pole owners and reject the Proposed Make-Ready/Access Rules.

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[44] *Pub. Util. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1055 (9th Cir. 2006) (emphasis added) (citations omitted).

[45] *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 37 (D.C. Cir. 2002) (emphasis added).

[46] *See e.g. Pub. Util. Comm'n of Cal.,* 462 F.3d at 1055 ("FERC's response was proportional to the identified problem: It ordered wholesale review of a market that it had identified as *wholly dysfunctional.*") (emphasis added).

[47] *See* Oncor Initial Comments, pp. 16-19; *see also, e.g.,* TWC Initial Comments, p. 8 ("[C]able operators cannot compel a utility to create 'surplus' pole space for their use."); AFPAR Initial Comments, pp. 25-36; EEI/UTC Initial Comments, pp. 2-3.

[48] *See e.g.* Oncor Initial Comments, p. 4 ("If, under the current pole attachment regime, broadband has flourished in urban areas - with more crowded poles - it is nonsensical to claim that make-ready issues are slowing deployment in rural areas.").

D. The Initial Comments Prove that the Proposed Make-Ready Rules Are Unworkable.

It is impossible to account for each and every possible make-ready scenario. On this, third-party attachers and pole owners agree. For example, CenturyLink argues that access timelines should be negotiated as there are simply too many variables for a general rule.[49] TWC acknowledges that, in at least one situation, parties must have flexibility and the ability to address pole access on a case-by-case basis: Where pre-existing "serious violations" exist, timelines "can and should be separately negotiated on a case-by-case basis."[50] Qwest confirms that the Commission must retain flexibility for factors beyond the pole owner's control and that "[t]hese situations vary in scope from project to project and mandatory timelines are not practicable in all situations."[51] AT&T, while stating the make-ready timeline is acceptable with a "rule of reasonableness" applied, acknowledges that no one can reasonably anticipate the variety of field conditions, local laws, and limitations on performance that can arise naturally and without unlawful intent.[52] USTA acknowledges that "[m]ake-ready work is extremely variable even on a pole-by-pole basis."[53] Finally, both Verizon and USTA agree that any timelines, if adopted, should be used as guidelines and not firm deadlines.[54]

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49 CenturyLink Initial Comments, p. 29 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 at ¶ 1143 (1996) (subsequent history omitted) ("there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation.")).

50 TWC Initial Comments, p. 19.

51 Qwest Initial Comments, p. 6.

52 AT&T Initial Comments, p. 28.

53 USTA Initial Comments, p. iv.

54 *Id.* at 21; Verizon Initial Comments, pp. 28-30.

The divergence of opinion among attachers on the appropriate make-ready rules also demonstrates how unworkable the proposed rules are.[55] For example, attachers' opinions differ greatly on what constitutes a "large request" for purposes of exemption from the proposed timeline. Level 3 recommends that applications for five percent of the total poles or 3,000 poles, whichever is greater, should be considered a large request.[56] AT&T suggests that any request encompassing 200 or more poles should be considered a large request.[57] Others contend that the proposed timeline is only appropriate for requests for fewer than 100 poles.[58]

What does this divergence of opinion tell us? The issues are nuanced and inherently local. The Commission has affirmed that "[i]ndividual utilities will continue to make pole-by-pole determinations regarding capacity, safety, reliability, and generally applicable engineering purposes."[59] When it comes to capacity determinations and make-ready issues, the Commission should leave the localized details, as well as related disputes, to the individual parties.

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[55] This divergence of opinion also exists in the states that have opted out of the Commission's jurisdiction of pole attachments. As noted in the Commission's one Workshop on Pole Attachments (held September 28, 2010), the rules crafted by the unregulated states vary greatly in the treatment of pole attachments, including make-ready timelines. This demonstrates the need for flexibility.

[56] Level 3 Initial Comments, p. 7. Oncor owns approximately 2 million distribution poles. Five percent of a 2 million pole system is 100,000 poles. On a typical pole line with third-party attachments, Oncor averages about 30 poles per linear mile. Under Level 3's approach, the proposed "extended" deadline would only apply when an attacher submits applications to attach to 3,333 or more *miles* of pole line. This would be an absurd and unworkable result.

[57] AT&T Initial Comments, p. 28.

[58] NTCA, OPASTCO, WTA, and ERTA Initial Comments, p. 10.

[59] *See* Order and Further Notice of Proposed Rulemaking, FCC 10-84, ¶ 24 (released May 20, 2010) ("Order and FNPRM").

E. The Proposed Make-Ready Timeline Is Particularly Unsuitable for Wireless Attachments.

The Commission sought comment on whether the wired pole attachment timeline is appropriate for wireless equipment.[60] Oncor explained in its Initial Comments that the answer is a decisive "no."[61] The other Initial Comments confirm Oncor's position – and it is not even a close call. Even CTIA recommends that, in the area of wireless attachments, the Commission should "encourage transparency while avoiding too large a federal role in management of the schedule."[62]

1. There is no Access Problem for Wireless Attachers.

As noted above, there is no pole access problem for communications attachers – wireline or wireless. The Initial Comments by wireless attachers provide further support. For example, the DAS Forum asserts that "utility claims of the overwhelming complexity of wireless attachments ring hollow in the face of the fact that it is being deployed in so many parts of the country right now."[63] While meant to criticize the current regulatory environment, upon close examination, the argument is self-defeating. If wireless attachments are being "deployed in so many parts of the country right now," then clearly pole access is not a problem.[64]

The Commission itself recognizes the great successes achieved by the mobile segment of the wireless industry – especially in rural broadband deployment. In January 2009, the

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60 Order and FNPRM, p. 18 n. 116.

61 Oncor Initial Comments, pp. 33-37.

62 CTIA Initial Comments, p. 11.

63 DAS Forum Initial Comments, p. 7.

64 Which explains why, as Ameren, CenterPoint and Virginia Electric Power Company point out in their Initial Comments, p. 12, "no wireless service provider has availed itself of the Commission's formal complaint procedures to resolve any real-time dispute involving alleged delays in the make-ready process."

Commission noted that "92 percent of the U.S. population lives in census blocks with at least one mobile broadband provider."[65] By May 2010, that statistic had improved to "98.1 percent of the U.S. population" being "served by one or more mobile broadband providers."[66]

According to CTIA, the success is not limited to the mobile broadband market; instead it is characteristic of the entire wireless broadband "ecosystem":

> The record in this and other Commission proceedings have made clear that ***there is no market failure in the wireless broadband market that justifies Commission intervention***, and thus no basis for the Commission to depart from a regime that has promoted considerable innovation, investment, competition, and consumer benefit.[67]

CTIA's Initial Comments claim that they experience "barriers to wireless broadband deployment."[68] As an example of one such "barrier," CTIA claims that a proposed San Francisco ordinance "would discourage the use of pole attachments on aesthetic zoning grounds, higher fees, and through multiple layers of city and citizen review."[69] Once again, CTIA's alleged "barriers" are unfounded. As pointed out in the Reply Comments of the City and County

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65 *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Conditions With Respect to Commercial Mobile Services, Thirteenth Report*, WT Docket No. 08-27, p. 9 (Jan. 16, 2009).

66 *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Conditions With Respect to Commercial Mobile Services, Fourteenth Report*, WT Docket No. 08-27, p. 7 (May 29, 1010); *see also Id.*, p. 39, Table 7 (showing that over 76% of the population are served by 3 or more mobile broadband providers).

67 CTIA of Reply Comments, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127 (Aug. 12, 2010) (emphasis added); *See also* Comments of CTIA – The Wireless Association, *In the Matter of High-Cost Universal Service Support,* WC Docket No. 05-337, *et al.,* p. 11 (July 12, 2010) (noting "tectonic shifts in the consumer preference").

68 CTIA Initial Comments, p. 5 n. 11.

69 *Id.*

of San Francisco, the City has required permits to install wireless facilities since 2007.[70] The current process has resulted in the issuance of over 150 wireless permits for wireless facilities in the public rights-of-way.[71] The Commission has rejected CTIA's previous efforts to have the Commission broadly preempt local ordinances requiring certain permitting requirements for wireless attachments.[72]

Again, the proponents for reform have failed to demonstrate a problem and, conversely, that the relief they request will have any impact on the Commission's stated goal.

2. Wireless Attachments Differ From Wireline Attachments and are Too Varied for Uniform Deadlines

The Initial Comments highlight the great variety of wireless equipment. As explained in Oncor's Initial Comments, bolstered by pictures (which should be worth a thousand words) and confirmed in the Initial Comments filed by other pole owners, each piece of wireless equipment differs in power output, dimension, height, weight, antenna size/location, power supply, photocell, etc.[73]

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70 City and County of San Francisco's Reply Comments, p. 2.

71 *Id.*

72 *See Declaratory Ruling, In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Dkt. No. 08-165, at ¶¶ 66-67 (Nov. 18, 2009) (rejecting CTIA's request that the Commission "declare that any ordinance automatically imposing [a requirement that a wireless service provider obtain a variance, regardless of the type and location of the proposal, before siting facilities as] an impermissible barrier to entry under Section 253(a) and is therefore preempted" because CTIA did not present "sufficient information or evidence of a specific controversy on which to base such action or ruling.").

73 *See, e.g.,* Oncor's Initial Comments, pp. 33-37; AFPAR Initial Comments, p. 45; The Coalition of Concerned Utilities Initial Comments, pp. 36-43; EEI/UTC Initial Comments, p. 26. *See also* http://www.extenetsystems.com/aboutus/photogallery.html for examples of the variety of antennas, nodes, fiber and other hardware that may be attached to utility poles.

Yet, the DAS Forum asserts that "utility claims of the overwhelming complexity of wireless attachments ring hollow."[74] MetroPCS goes even further, claiming that utility concerns regarding differing wireless equipment are "phantom."[75] One need only look to the actual, tangible record to see through the empty advocacy of the DAS Forum and MetroPCS.

MetroPCS itself asserts that the "typical" antenna is "approximately two inches wide and either twenty-six (26) or forty-eight (48) inches in length."[76] Yet, the antennas requested to be installed on Oncor's poles are as high as seventy-eight (78) inches and as wide as thirty-six (36) inches.[77] These variances translate to additional and very different make-ready work.[78] As discussed in greater detail in Oncor's Initial Comments, wireless equipment typically occupies more space on a pole and requires additional make-ready (such as pole changeouts).[79] While only 3.8% of Oncor's poles permitted for wireline attachments require make-ready, the frequency increases to approximately 20% for wireless attachments.[80] For these reasons, as Qwest explains, "wireless attachments present unique challenges"[81] that are not suitable for set timelines.

Interestingly, CTIA's comments in the Commission's "Third-Way" Docket also flatly contradict the assertions of DAS Forum and MetroPCS. There, while pursuing a drastically

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74 DAS Forum Initial Comments, p. 7.

75 MetroPCS Initial Comments, p. 13.

76 *Id.* at 7.

77 Oncor Initial Comments, pp. 33-34.

78 *See, e.g.,* Oncor's Initial Comments, pp. 33-37; AFPAR Initial Comments, p. 45; The Coalition of Concerned Utilities Initial Comments, pp. 36-43.

79 Oncor Initial Comments, p. 35.

80 *Id.* at 37.

81 Qwest Initial Comments, p. 10. It is worth noting that Qwest explains that they attach to more poles than they own (which is not uncommon for the ILEC commenters).

different regulatory agenda, CTIA was very candid about the vast differences in wireline and wireless technology:

> The Commission correctly acknowledges that ***there exists significant technical and other differences between wireless broadband networks and the wireline networks for which Title II was intended.*** As CTIA repeatedly has discussed, ***those differences compel a different treatment for wireless services*** if the Commission inadvisably proceeds with its 'Third Way' approach for wired broadband services.[82]

In addition, CTIA noted the rapidly changing nature of the wireless broadband "ecosystem":

> The fact remains that this ecosystem is moving at the speed of sound, and efforts to define how to manage networks, and what is, and what isn't reasonable, will be overtaken by changes before they are even adopted.[83]

Those differences, acknowledged by CTIA, make even more compelling the pole owners' positions in this docket. As succinctly stated by ITTA, "wireless attachments [] warrant different treatment."[84] Make-ready issues (especially in the dynamic world of wireless attachments) must be left to the local, individual dealings between pole owners and attachers.

II. RECORD EVIDENCE PROVES THAT UNAUTHORIZED ATTACHMENTS ARE A SUBSTANTIAL SAFETY AND RELIABILITY THREAT.

The record is filled with overwhelming evidence that unauthorized attachments occur with alarming regularity and pose substantial safety and reliability concerns. Instead of offering

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82 CTIA Reply Comments, GN Docket No. 10-127, p. 6 (Aug. 12, 2010) (emphases added).

83 *Id.* at 15.

84 ITTA Initial Comments, p. 2.

their own data, attachers deny the undeniable or play a "blame game" – attempting to explain away a problem they claim does not exist.[85] The FCC should not be fooled.

The absurdity of the attaching entities' position is best exemplified in Charter's Initial Comments. Charter contends that pole owners have not shown that attachers "routinely make unpermitted attachments" or that current penalties do not work.[86] Charter then claims, however, that if the FCC adopted the Oregon unauthorized attachment penalty, "joint use in the 30 non-certified states ***would grind to a halt, along with broadband deployment***."[87] Although dramatic, Charter's assertion is nonsensical. If unauthorized attachments ***are not*** a problem or are not "routinely" made, then one has to ask: How would stiffer penalties – only assessed after an unauthorized attachment is discovered – "halt" joint use and broadband deployment? The simple fact is that if attachers do not make unauthorized attachments, as they claim, they have no reason to be concerned with the penalty.

The problem of unauthorized attachments is real, heavily documented and must be addressed. As admitted by attachers in their comments, the attachment process plays a key role in preserving and maintaining the safety and reliability of pole infrastructure.[88] It is time for the

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85 *See, e.g.*, NCTA Initial Comments, pp. 42-43 ("[U]tility assertions that attachers routinely fail to permit attachments and thereby cause pole safety issues are unsupported, inaccurate and misleading."); TWC Initial Comments, p. 30 ("[U]tility claims of massive unauthorized attachments in the field are overblown and misleading."); Bright House Networks Initial Comments, p. 28 ("[T]he reality is that utilities' claims of widespread unauthorized attachments are unreliable and do not warrant adoption of a stiffer penalty regime.").

86 Charter Initial Comments, p. vi.

87 *Id.* at 32 (emphasis added).

88 *See, e.g.*, Charter Initial Comments, p. 26 ("Charter is committed to safety and grid integrity because without a reliable, safe and secure system of poles and related facilities, Charter would not be able to serve its customers."); Comcast Initial Comments, pp. 33-34 ("Comcast and other attachers are vitally interested in maintaining properly authorized facilities that are in compliance with applicable safety codes. . . . Well maintained and compliant facilities provide for better, more reliable delivery of quality communications services, which in today's

Commission to firmly acknowledge the actual threats to safety and reliability created by unauthorized attachments and recognize the rights of pole owners to enforce contractual penalty provisions.[89]

A. The Record Evidence Establishes High and Increasing Numbers of Unauthorized Attachments.

Because of the emphasis on competition in today's market, attachers are desperate to obtain speed-to-market while at the same time decreasing (or even eliminating) costs in rolling out new communications services. Apparently, the temptation of making large numbers of unauthorized attachments is just too appealing to resist. Unauthorized attachments are a significant and persistent problem creating substantial safety and reliability concerns.[90]

The data filed in this proceeding – by multiple pole owners – consistently reveals high and increasing numbers of unauthorized attachments. On Oncor's system alone, Charter had

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competitive environment is essential to survival."); NCTA Initial Comments, p. 43 ("Cable attachers have a strong interest in ensuring that their attachments to poles are properly permitted and that all their facilities are compliant with applicable safety codes and will not be disrupted due to improper engineering practices.").

[89] *See* Order and FNPRM, ¶ 91 (Unauthorized attachments "**can compromise safety because they bypass even the most routine safeguards**, such as verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements of the utility and the NESC.") (emphasis added); *see also Id.* at ¶ 67 (acknowledging that communications attachers "wish to roll out services as quickly as possible, and consequently do not have the same incentives to maintain the safety and reliability of the infrastructure as utilities themselves would.").

[90] *See, e.g.,* Oncor Initial Comments, pp. 48-51; Florida IOU Initial Comments, pp. 49-51; The Coalition of Concerned Utilities Initial Comments, pp. 93-101; EEI/UTC Initial Comments, pp. 53-56; APPA Initial Comments, p. 30 ("Unauthorized attachments are a significant and persistent problem for many municipal utilities that raises serious safety and operational issues."); CenturyLink Initial Comments, p. 38 ("Unauthorized attachments are a serious and widespread problem. . . . Unauthorized attachments raise legitimate safety concerns for pole owners.").

1,668 unpermitted attachments from 2003 to 2008.[91] By contrast, Charter submitted only 102 attachment permits during that same time.[92] Oncor's 2002-2003 pole attachment count found more than 25,000 unauthorized attachments system-wide (by all attachers).[93] The 2007-2008 pole attachment count revealed an increasing problem, uncovering 31,139 unauthorized attachments.[94] While attachers argued with *some* of the results and Oncor worked through these marginal issues, as a result of the 2007-2008 attachment count a total of 24 attachers paid a combined sum of $1.2 million for unauthorized attachments.[95] Using the $1.2 million paid as a measure of the validity of the attachment count (which, for a variety of reasons is imperfect, but at least instructive), translates to payment for 26,096 total unauthorized attachments (or 83% of those identified). The average amount paid per unauthorized attachment reflects a modest $48.50, for five years back rent, interest and, in some instances, a $25 processing fee (which, relying on Commission precedent, many attachers refused to pay). These numbers reflect neither significant error in the process nor exorbitant penalties that have halted anything.[96] Attaching entities have proven that they know their way to the Commission's Enforcement Bureau. Had the attachments truly been authorized, the attachers would not have paid anything. The unauthorized attachment problem is real.

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91 Flewharty Decl. at ¶ 2.

92 *Id.*

93 Oncor Initial Comments, p. 48.

94 *Id.*

95 *Id.* at pp. 48-49.

96 Oncor's experience is that these amounts are difficult to recover given the Commission's current unwillingness to endorse such a deterrent. *See* Oncor Initial Comments pp. 50-51. In the end, there is no record evidence whatsoever that Oncor, or any other pole owner, "makes money" as a result of unauthorized attachments. The truth is quite the contrary.

The Initial Comments submitted by other pole owners reflect similarly disconcerting statistics. For example, a 2002 audit performed by Toledo Edison found unauthorized attachment rates of 29% and 33%, respectively, for telephone and cable attachments.[97] EEI and UTC members report unauthorized attachment percentages for their members as high as 32%.[98] The Alliance for Fair Pole Attachment Rules points out that even low unauthorized attachment percentages, such as those ranging between two and six percent, are actually staggering because most "major investor owned utilities typically own anywhere between several hundred thousand and more than a million distribution poles, with a correspondingly large number of attachments."[99]

B. There Are No Excuses for Unauthorized Attachments.

Several attachers assert a number of excuses for why the unauthorized attachment problem does not exist, is "overblown" or is not their fault.[100] These include theories that the

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97 The Coalition of Concerned Utilities Initial Comments, p. 97.

98 EEI/UTC Initial Comments, p. 55; *see also* Florida IOU Reply Comments, WC Dkt. No. 07-245 (NPRM), p. 6 (April 22, 2008) (reporting over 61,000 collective unauthorized attachments); EEI/UTC Comments, WC Dkt. No. 07-245 (NPRM), p. 34 (March 7, 2008) (reporting that CenterPoint Energy reported approximately 79,000 unauthorized attachments); The Coalition of Concerned Utilities Comments, WC Dkt, No. 07-245 (NPRM), p. 74 (March 7, 2008) (reporting that an audit performed by Toledo Edison found a 29% unauthorized attachment rate for telephone attachments, and a 33% unauthorized attachment rate for cable companies). *See also,* UTC Survey, p. 19 ("Unfortunately, utilities are finding that many pole attachments are unauthorized and/or in violation of code. Utilities reported on average more than 11% of all attachments are unauthorized and more than 13% are in violation of code.").

99 AFPAR Initial Comments, p. 74.

100 Bright House Networks Initial Comments, p. 28. While agreeing that "adherence to proper permitting processes is important," Bright House Networks contends that the FCC should not adopt unauthorized attachment penalty schemes because "the reality is that utilities' claims of widespread unauthorized attachments are unreliable." *Id.* Ironically, Bright House contends that because of the "***fact-intensive*** . . . nature of [unauthorized attachment] claims," the FCC "***should eschew a uniform unauthorized attachment regime***. . . . Instead, the Commission should continue to address claims through ***case-by-case adjudication*** using its existing rules." *Id.* at 32-33 (emphasis added). Again, the attachers seek a "heads we win, tails you lose"

clear data outlining the pervasive amount of unauthorized attachments is "unreliable" because of: 1) lax or non-existent record-keeping by pole owners, 2) sloppy audits, 3) pole ownership changes, 4) changes in the definition of attachment (*e.g.* service drops), and 5) failure of pole owners to notify attachers of pole surveys or allow them to participate.[101] Admittedly, no process is perfect. Oncor's data from its 2007-2008 pole audit demonstrates, however, that the margins of error are fairly small. Nonetheless, Oncor takes particular issue with some of the specific alleged "errors" claimed by the attachers.[102] The attachers' arguments are neither supported by the real-world relationships nor do they excuse the actions of those that make unauthorized attachments.

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paradigm. They claim that the FCC has essentially plenary authority to adopt provisions they want in some fact-intensive areas (strict make-ready deadlines, compensatory damages, etc.) but not with respect to penalties for unauthorized attachments.

[101] Charter Initial Comments, p. 27 (emphasis added); Comcast Initial Comments, p. v; TW Telecom & Comptel Initial Comments, p. 33 n. 72.

[102] NCTA's FNPRM Initial Comments cite to a portion of Comcast's NPRM Reply Comments as an example of pole owners being at fault for the high number of unauthorized attachments. *See* NCTA Initial Comments, pp. 45-46. Notably, NCTA did not cite to any of its own data and the Comcast claim actually refers to a situation with James Cable. The compliance audit addressed safety violations in general (*i.e.,* clearance violations, tagging violations, etc.), not unauthorized attachments. It was not an attachment count nor did it reveal in any way that Oncor was responsible for the unauthorized attachments. Comcast claimed that "a sample of poles that Oncor had demanded be replaced because of alleged cable operator safety violations was reviewed. At the conclusion of this joint review, it was found that Oncor had in fact caused all of the violations that necessitated the pole replacements for the sample of poles reviewed." Comcast Reply Comments, WC Dkt. No. 07-245 (NPRMJ), p. 26 (April 22, 2008). As evidenced by James Cable's payment to cure violations, Oncor did not cause "all of the violations." Moreover, to equate the violations discussed in Comcast's Reply Comments with the high number of unauthorized attachments would be equating apples to oranges. If the example provided by Comcast is useful at all to this proceeding, it is simply an example of Oncor working with a small cable operator together in the field to address any issues.

1. Attachers' Claims of Poor Record Keeping by Pole Owners Fall Flat.

No recordkeeping, whether by a pole owner or an attacher, is 100% accurate 100% of the time. TWC acknowledges as much when they admit that 1) "[i]n some cases, TWC may not have complete permit records because such records were not provided by the prior owner of the cable system" and 2) TWC cannot readily identify which of their attachments are telecommunications attachments.[103] Of course, TWC, and most every other attacher, has much less pole related data to track and maintain than electric utility pole owners. Even so, Oncor makes every reasonable effort to maintain accurate and reliable records.[104] Where there is a problem, Oncor works with the attacher to resolve the issue (who should, by agreement, have their own records to help ensure accuracy).[105] This is the way it should work. While disputes do arise, there is no record keeping issue sufficient to justify the shocking numbers of unauthorized attachments documented in this proceeding (which is why the attachers offer rhetoric, and not data, to support their assertions).

Attachers are clearly not as "innocent" as they claim. Instead, in Oncor's experience, disputes regarding the number of unauthorized attachments are often the result of attachers: (1) making unauthorized attachments instead of complying with the permitting process; (2) transferring, assigning or purchasing facilities without complying with the contractually required processes; and (3) failing to provide contractually required notice of removal of attachments.[106]

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103 TWC Initial Comments, p. 33; *see also* at 5 ("The current scheme requires a cable operator to separately track any of the poles that are used to provide 'telecommunications services.' That task is incredibly complex in a cable system that is an integrated voice, video and data network, requiring sophisticated technology and countless employee hours to correlate customer services and pole routes. And the results are subject to dispute by utilities.").

104 Flewharty Decl. at ¶ 11.

105 *Id.*

106 *Id.* at ¶ 9.

If an attacher disagrees with the number of unauthorized attachments for which it is invoiced, the attacher is free, and, in fact, is encouraged to present data demonstrating any error. If Oncor is wrong, it will admit its error and remedy the issue.

2. Oncor's Pole Inventories, Counts and Audits.

Oncor conducts pole inventories, counts and audits to monitor the status of its poles, as well as the compliance of attachments on its poles.[107] In advance of any such exercise, Oncor invites and encourages the participation of all attachers.[108] Oncor explains the process and invites attacher input.[109] Unfortunately, Oncor's experience is that few attachers choose to participate.[110] Instead, they simply wait to pick holes in the process after the fact. If attachers would participate in the audits, many of the post-audit issues would likely be resolved in the field real time.[111]

Because safety and reliability are important to Oncor, and because conducting pole counts is not cheap, Oncor makes it a top priority to obtain accurate records of such results.[112] To account for typical errors which could be made in the pole count process, before the process starts, the parties discuss and agree upon a deviation percentage allowance to be applied, *i.e.* a set percentage of unauthorized attachments for which the third-party is not required to pay.[113]

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107 *Id.* at ¶ 10.

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* at ¶ 11.

113 *Id.*

Again, as discussed above, if problems are identified, Oncor works with the attacher and the final numbers are adjusted if necessary.[114]

3. Changes in Definition of Attachment.

Charter claims that counting service drops as attachments yields higher unauthorized attachment numbers because service drops typically do not require a permit.[115] But permitting is only half of the service drop equation. Oncor's negotiated agreements define "equipment" to include a service drop attachment:

> the equipment, including appurtenances, attached by or on behalf of Licensee to any Pole. Such equipment shall include, without limitation, fiber optic or other cables, amplifiers, ***wires (including Service Drops)***, and appliances, together with associated cable messengers and anchors, as well as radios, antennas, cameras, and other wireless equipment.[116]

Oncor does not require a permit before a service drop is attached, but does require notification after a service drop is made:

> Notwithstanding the requirements of Section 4.1, Licensee may attach a Service Drop to any Pole without first submitting a Permit Application requesting such attachment; provided, however, that Licensee shall notify Oncor Electric Delivery within fifteen (15) days after Licensee makes such attachment. Licensee shall thereafter notify Oncor Electric Delivery within fifteen (15) days after Licensee makes any change to a Service Drop previously attached to any Pole, as more fully described in the Permit Application. Within thirty (30) days of receiving any such notice, Oncor Electric Delivery may, at Licensee's sole cost, inspect the Service Drop, for the purpose of confirming that such attachment is in compliance with the Standards. In the event that Oncor Electric Delivery (or, as appropriate, a Oncor Electric Delivery Representative) determines that such attachment is not in compliance with the Standards, Licensee shall, at its sole cost,

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114 *Id.*

115 Charter Initial Comments, p. 27.

116 Flewharty Decl. at ¶ 12 (emphasis added).

> promptly correct any condition of such attachment, as necessary to ensure that such attachment is in compliance with the Standards.[117]

Attachers should be pleased with these provisions as they allow them to provide service to new customers without prior permitting. At the same time, it allows Oncor to analyze the impact of the service drop on the pole and to update its billing records. Contrary to the assertions of some attachers, the definition of attachment has not changed. If service drops are playing a role in unauthorized attachments, it is due to the attachers' failure to comply with their unambiguous contractual service drop reporting obligations.

C. Pole Owners Must be able to Enforce Contractual Penalty Provisions.

The Commission is correct that "penalties amounting to little more than back rent may not discourage non-compliance with authorization processes."[118] In fact, there is no "may" to it. In the current environment, unauthorized attachments continue to increase. The solution is simple: allow pole owners to enforce negotiated, meaningful contractual penalty provisions.[119] Oncor specifically urges the Commission to explicitly vacate its decisions in *Mile Hi*, *CTAG* and *Salsgiver*, to the extent those decisions address contractual unauthorized attachment penalties.

In response to the Commission's specific request, many utilities and attachers commented on the proposed adoption of the Oregon Model for unauthorized attachment penalties. While the Oregon Model may in fact help to address the prevalence of unauthorized attachments based on

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117 *Id.* at ¶ 13.

118 Order and FNPRM, ¶ 94.

119 Oncor Initial Comments, pp. 17, 48-52; AFPAR Initial Comments, p. 75 ("The best approach to addressing the problem of unauthorized attachments is to allow the utility in its discretion to specify sufficiently deterrent penalties as conditions for attachments."); The Coalition of Concerned Utilities Initial Comments, pp. 99-104 (setting out requirements and penalties the Commission should allow electric utilities to contractually enforce); Florida IOUs Initial Comments, p. 51 ("The solution to the unauthorized attachment problem is for the Commission to decline the invitation to interfere with an electric utility's enforcement of its pole license agreements.").

its penalty scheme, the same result could be reached by simply allowing electric utility pole owners to enforce their negotiated contracts. However, Oncor does not oppose the Oregon Model being presumptively reasonable with the tweaks set forth in Oncor's Initial Comments.[120] Many other electric utility pole owners also support some variation of the Oregon Model as presumptively reasonable and believe that adoption of the Oregon Model would reduce the incidence of unauthorized attachments.[121]

Not surprisingly, most third-party attachers oppose the adoption of a rigorous penalty regime and specifically oppose adoption of the Oregon Model. Notably, however, the attachers do not dispute that the Oregon Model has helped to reduce unauthorized attachments. The proposed "remedies" set forth by attachers vary greatly. Some attachers claim that maintaining the status quo (back rent, plus interest) is a sufficient deterrent.[122] Others suggest that the Commission should not even consider an attachment to be unauthorized where there is not an actual safety problem.[123] TWTC and Comptel urge the Commission to adopt regulations that include specific definitions for unauthorized attachments, prohibit utilities from removing or rearranging unauthorized attachments, require electric utilities to provide notice by identifying

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120 Oncor Initial Comments, pp. 51-52.

121 *See, e.g.,* Alliant Energy Initial Comments, p. 7; The Coalition of Concerned Utilities Initial Comments, pp. 100-101 (citing data provided by Portland General Electric reporting that the Oregon Model resulted in a drop in the rate of unauthorized attachments from 30% to 1%).

122 *See, e.g.,* Charter Initial Comments, p. 2 ("[t]he current system more than adequately provides attachers with incentives to follow permit processes."). Oncor is at a loss as to how attachers can in good faith claim that the current system provides an adequate "incentive" or "deterrent" regarding unauthorized attachments in light of the overwhelming data to the contrary. On Oncor's system, Charter had 1,668 unpermitted attachments from 2003 to 2008. By contrast, Oncor received only 102 attachment permits during that same time. Flewharty Decl. at ¶ 8.

123 TWTC and Comptel Initial Comments, p. 27.

and contacting attachers with unauthorized attachments and mandate specific timelines for corrections.[124]

ITTA even suggests that there should be a distinction between "good faith" attacher errors and attachments "affixed with an intent to avoid payment or other requirements."[125] ITTA fails to explain how the subjective intent of an attacher will be determined. ITTA's proposal will not work. It seems reasonable to presume that all attachers would claim "good faith" in every instance. Instead, attachers should exercise "good faith" in complying with the permitting process in their existing agreements.

The attachers' distinctions, and requests for forgiveness after making unauthorized attachments, are inexcusable. ***Each*** unauthorized attachment impacts safety and reliability (*e.g.* pole loading is impacted by each attachment[126]), and ***each*** unauthorized attachment should be subject to the same stiff penalty.

III. OVERLASHING SHOULD REQUIRE PRIOR NOTICE AND THE CURING OF EXISTING VIOLIATIONS.

In recent years, overlashing has become a significant safety and capacity concern. Yet, embedded in TWC's Initial Comments comes the request that the Commission "reaffirm that

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124 TWTC and Comptel Initial Comments, pp. 23-27. They also claim such penalties should be paid to the Commission, not the pole owner. *Id. at* pp. 33-34.

125 ITTA Initial Comments, p. 10.

126 *See Quanta Technology Distribution Hardening: Benchmark Survey and Best Practices, Final Report*, p. 4 (Aug. 4, 2009) ("Attachments increase the wind loading of poles. Therefore, it is important for utilities to have a good understanding of the number and size of third-party attachments on their distribution poles. ... The ability of a distribution pole to withstand extreme loads (such as wind and ice) is a direct function of its loading. Therefore, a utility should have systems and processes in place to ensure that poles do not become overloaded after they are initially installed. At a minimum this should include (A) a loading assessment whenever an additional piece of equipment is placed on the pole, (B) a loading assessment whenever a new attachment is discovered on the pole, and (C) mitigation actions as appropriate."). It is worth noting that Quanta Technologies is a sister corporation to Sunesys – who fled aggressive comments seeking liberal access rules.

cable operators are not required to give notice or obtain advance permission before overlashing a host attachment."[127] According to TWC, finding that a cable operator does not need to provide a utility with advance notice or obtain approval prior to overlashing a host attachment "promotes competition" and "minimizes installing and financing infrastructure facilities."[128] TWC claims that it "is forced to expend significant resources negotiating over an issue that the Commission has long-since settled."[129]

TWC's argument is flawed for many reasons including, without limitation: (1) overlashing creates an additional burden on the pole that must be analyzed prior to overlashing; (2) overlashing creates additional safety and reliability concerns; and (3) both the NESC and Oncor's standards mandate that existing violations be cured prior to or at the time of the overlashing – not at some undetermined later date. For these reasons, the Commission should not sanction an "attach now and fix later" regime.

A. Overlashing Creates Additional Loading Safety and Reliability Concerns.

Attachers often claim that they should not have to provide notice prior to overlashing because the burden on the pole does not increase with just "one small wire." This is simply not true.[130] On Oncor's system, the additional cables and/or wires routinely overlashed by cable companies contain dozens of strands of optical fiber.[131] The repetition of this process causes the diameter of the bundles to increase significantly, which in turn increases the overall weight of the

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127 TWC Initial Comments, p. 36.

128 *Id.* at pp. 28-29.

129 *Id.* at p. 29.

130 *See* Oncor Comments, WC Docket No. 07-245 (NPRM), pp. 17-18 (March 7, 2008).

131 *Id.*

attachment.[132] The increased weight is further impacted by the effects of wind and ice loading.[133]

Oncor's experience is not unique. The Coalition of Concerned Utilities reports that as a result of minimal oversight of the work contracted by attachers, utilities have encountered "excessive overlashing."[134] EEI reports that "[o]verlashed attachments impose substantial wind and ice loading burdens on electric utility poles."[135] The CATV industry itself recognizes the additional load impact of overlashing. The *Recommended Practices for Coaxial Cable Construction and Testing Manual* (the "CATV Manual") explains that "pre-engineering" of existing plant must take place before overlashing.[136] The CATV Manual goes on to explain that "pre-engineering" is designed to ensure that the "poles and/or strands [will] support the load requirements."[137]

In addition, as part of the 2007 Florida Electric Infrastructure Storm Hardening Docket, many electric utilities entered into stipulations with the Florida Cable Telecommunications Association ("FCTA") wherein the FCTA agreed to provide the utilities with prior notice of overlashing.[138] The stipulations set forth that "[u]nder no circumstances … [were] FCTA member operators [allowed] to overlash where such overlashing would overload any pole or pole

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132 *Id.*

133 *Id.*

134 The Coalition of Concerned Utilities Initial Comments, p. 95.

135 EEI/UTC Initial Comments, p. 78.

136 *See* Reply Comments of Oncor Electric Delivery Company, WC Dkt. No. 07-245, p. 5 (NPRM) (April 22, 2008).

137 *Id.*

138 The stipulation between Tampa Electric Company and FCTA, which serves as an example of the various stipulations entered into by the utilities and FCTA, is available at http://www.psc.state.fl.us/library/filings/07/09138-07/09138-07.pdf.

line."[139] The stipulations and the overlashing policies implemented pursuant to the stipulations emphasized the importance of pre-engineering prior to overlashing.[140]

The Commission has also confirmed that overlashing can present an additional burden on the pole: "[t]o the extent that the overlashing ***does create an additional burden on the pole***, any concerns should be satisfied by compliance with generally accepted engineering practices."[141] Although Oncor agrees that overlashing creates an additional burden on the pole, it disagrees with the assertion that compliance with "generally accepted engineering practices" is sufficient to address its concerns regarding overlashing. Pole owners must also be able to enforce their utility-specific standards. Unregulated pole owners (municipals and co-ops) also seem to understand the engineering issues presented by overlashing. For example, in its *APPA Pole Attachment Work Book* ("APPA Work Book") the American Public Power Association notes that "the overlashing of existing facilities is considered a separate attachment requiring prior authorization through the permitting process."[142] The APPA Work Book goes on to explain: "The rationale for treating overlashing in the same manner as other attachments, in terms of access, is that ***overlashing can have significant impacts on pole loading and required separations.***"[143]

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139 *Id.*

140 *Id.*

141 *In the Matter of Implementation of Section 703(e) of the Telecommunications Act*, 13 FCC Rcd. 6777 (February 6, 1998), ¶ 64 (emphasis added); *see also* Quanta Report, fn. 126, *supra.*

142 *See* Reply Comments of Oncor Electric Delivery Company, WC Dkt. No. 07-245, pp. 5-6, Exh. D (NPRM) (April 22, 2008).

143 *Id.* (emphasis added).

It is undeniable that overlashing presents an additional burden on the pole and, therefore, presents additional safety and reliability concerns.[144] A utility must be able to determine whether a given pole or pole line is of sufficient strength to accommodate an overlashed cable or fiber. This allows the utility or its contractor to perform the necessary strength and loading analysis to ensure that the overlashing does not impair the safety and reliability of the electric infrastructure. This is why Oncor, consistent with many other pole owners, requires advance notice of overlashing.[145]

B. Existing Violations Must be Cured Prior to or at the Time of Overlashing.

In addition to pre-engineering, prior notice allows a utility to: (1) ensure that the pole and cable to be overlashed do not have pre-existing violations of the NESC or utility-specific standards and/or specifications, and (2) to confirm that the desired overlashing will not create

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[144] *See, e.g.,* Reply Comments of Oncor Electric Delivery Company, WC Dkt. No. 07-245, p. 5, Exh. B (Declaration of Wil Arnett, Tab 1) (NPRM) (April 22, 2008). Although attachers often claim that an overlashing does not create any additional safety or reliability concerns, once again, this is simply not true. For example, the California Public Utilities Commission determined that improperly maintained utility lines and CATV attachments were to blame for the October 2007 San Diego, California wildfires. Specifically, the CPUC determined at least one of the fires was the result of a Cox Communications overlashing making contact with a San Diego Gas & Electric primary. More than 1,300 homes were destroyed and more than 200,000 acres were burned as a result of the October 2007 fires. Two people were killed as a result of these fires. The deaths and property damage caused by the California fires is just one example of the importance of maintaining poles and all attachments thereto (both electric and communications) in a manner that is complaint with the NESC and other applicable standards and specifications. Further, measures must be taken to ensure that no new violations are created by such attachments or overlashings. Oncor's requirement of advance notice allows Oncor to cure any existing violations and determine if remedial or make-ready work is necessary on the front-end.

[145] As set forth in the 2007 UTC Survey, 70% of pole owners require notice prior to overlashing. *See* UTC Survey, p. 14.

violations.[146] If violations exist, they must be cured prior to or at the time of the overlashing. If the overlashing will create a violation, the necessary advance make-ready must be performed.

TWC claims that instead of correcting violations prior to attaching, in order to accelerate the permitting process (*i.e.*, improve speed-to-market – the central theme of comments submitted by attachers), "where new attachments or overlashing give rise to ***minor*** Code violations, such violations can be cured post-installation."[147] TWC asks the Commission to sanction a protocol allowing attachers to overlash facilities on poles that are not compliant with the NESC and/or the pole owner's construction standards and specifications, and then later go back to fix the problems.

TWC's argument for wholesale "temporary" overlashing or attachments does not comport with NESC provisions or NESC best practices. For example, a temporary attachment does not alleviate the need to satisfy clearance requirements. The only "exception" provided for temporary attachments is that the strength requirements may be reduced to Grade N.[148] Overlashing on facilities that do not meet the NESC is in violation of several NESC rules and is not an accepted good practice.[149] In addition, the "install-it-now, bring-it-up-to-code-later"

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[146] *See* Comments of Oncor Electric Delivery Company, WC Docket No. 07-245 (NPRM), pp. 18-19 (March 7, 2008).

[147] TWC Initial Comments, p. 20 (emphasis added). TWC offers no explanation as to what constitutes a "minor" violation. Oncor has previously addressed why TWC's position must be rejected and why permitting and/or advance notice procedures must be allowed and enforced. *See* Reply Comments of Oncor Electric Delivery Company, WC Dkt. No. 07-245, pp. 5-10 (NPRM) (April 22, 2008) (attaching photographs of TWC contractors overlashing on poles with existing violations when they should never have worked on the pole).

[148] *See* NESC Rule 014B (stating that the requirements for non-temporary installations must be met except that strength requirements may be reduced to Grade N; does not allow reductions in the NESC clearance requirements).

[149] *See* NESC Rule 012A ("All electric supply and communication lines and equipment shall be designed, constructed, operated, and maintained to meet the requirements of these rules"); *see also* NESC Rule 012B (placing the burden on the attacher to meet the NESC);

approach has several inherent problems including, without limitation, changes in staff who agreed to the approach, changes in project priorities leaving the required corrections of the violations to be excessively delayed or never addressed, and budgeting issues that delay or postpone the required corrections of the violations.

The FCC previously rejected a similar request by TWC to attach first and clean-up later.[150] In the ordering paragraph of *Time Warner – Kansas City*, the Commission stated:

> Time Warner Cable of Kansas City ***SHALL NOT*** overlash its own lines or make new attachments to poles which have been identified as not meeting the requirements of the National Electrical Safety Code, or which have been determined would be in violation of the National Electrical Safety Code upon overlashing or attachment by Time Warner Cable of Kansas City, until the necessary pole change-out and/or make-ready work for that pole is completed.[151]

The Commission enforced the contractual permit process agreed to by the parties.[152] The Eleventh Circuit has also confirmed that "the FCC rules do not preclude [pole] owners from negotiating with pole users to require notice before overlashing."[153] This is wholly consistent

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NESC Rule 012C (regarding accepted good practices); NESC Rule 013 (requiring that various NESC rules be met for a new installation); NESC Rule 013B3 (assuming the existing facility is not in compliance with a past code or the current edition of the NESC, it is appropriate to correct the violation before or at the time of the overlashing); and NESC Rule 214 (requiring that lines and equipment comply with the code when placed in service). These rules apply during the initial design and construction phase of the overlashing of a new communications cable – not at some later date.

150 *See In the Matter of Kansas City Power & Light Company v. Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City*, 14 FCC Rcd. 11599 (1999).

151 *Id.* at ¶ 26 (emphasis added).

152 *Id.* at ¶ 20 ("The pole attachment agreements between KCPL and Time Warner anticipate a process whereby Time Warner files an application to request a permit to attach.").

153 *Southern Co. Servs. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002).

with a utility's right to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[154]

C. Actions Speak Louder than Words: Attachers Fail to Uphold Their Promises to Cure Violations.

Oncor's agreements specifically require notice prior to overlashing.[155] Yet, some attachers fail to provide that notice, simply attaching "at will" regardless of the capacity or condition of the pole.[156] For example, in 2008, after Oncor discovered a TWC contractor overlashing on a pole with a preexisting NESC violation in the power supply space, TWC came clean and provided notice of several projects where TWC had overlashed without providing prior notice.[157]

Oncor then post-inspected 3,015 poles on which TWC had overlashed in violation of the pole license agreement.[158] Oncor found 497 violations (a violation rate of over 16%).[159] Approximately 180 poles (approximately 6%) had existing violations in the power space.[160] These violations are especially troubling from a safety standpoint. Neither TWC nor its contractors should have been working in this situation. The 497 violations found during the post-inspection clearly indicate that TWC attached to poles with existing violations; poles to which they would not have been allowed to overlash if TWC had complied with the contractual

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154 47 U.S.C. § 224(f)(2).

155 Flewharty Decl. at ¶ 14.

156 *Id.*

157 *Id.*

158 *Id.* at ¶ 15.

159 *Id.*

160 *Id.*

obligations. For TWC, speed-to-market prevailed over safety; the Commission should not sanction this dangerous attitude.

In yet another instance, as discussed in detail in Oncor's NPRM Reply Comments, TWC failed to provide prior notice when performing an overlashing project in Arlington in 2008, allowing a TWC contractor to overlash a TWC facility actually running through several energized secondary leads connected to Oncor's transformer.[161] In yet another instance, another TWC worker on the same project was caught violating the NESC and Oncor mandated forty (40) inch Communication Worker Safety Zone.[162] TWC's excuse? Speed-to-market. In a word, unacceptable.

Oncor's Overlashing Notice Process works – without delaying attachers' access to market. Oncor's standard pre-inspection process typically identifies 25%-30% of poles requiring some type of make-ready to cure violations prior to attachment/overlashing.[163] As a result, number of post-inspection violations is ***negligible***.[164] This is how it should work. Compared to the 2008 data set created by TWC's clandestine overlashing (497 violations (over 16% of the total poles inspected)), it is beyond debate that prior notice provides much more protection to the safety and reliability of Oncor's system (and those working in or around it).

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161 *See* Reply Comments of Oncor Electric Delivery Company, WC Docket No. 07-245 (NPRM), pp. 7-10 (April 22, 2008).

162 *Id.*

163 Flewharty Decl. at ¶ 16.

164 *Id.*

Overlashing should be done right the first time – not cleaned up later because the attacher wants to move faster. The Commission should reject TWC's request to confirm that overlashing does not require prior notice.[165]

IV. MANDATED USE OF APPROVED CONTRACTORS IS UNNECESSARY AND DANGEROUS.

Oncor opposes the Commission's proposed mandate that electric utilities allow attachers to use contractors to (1) circumvent established (and negotiated) permitting protocols; (2) attach without necessary pre-engineering (triggered by an unworkable and *ultra vires* make-ready timeline); (3) perform critical surveys; or (4) (as a few commenters assert) perform any work in the power supply space. Oncor's control over its poles, including who is permitted to work on its poles (including when and how), is vital to maintaining a safe and reliable network. This is particularly true if, as wrongly suggested by some attachers, electric utilities are forced to allow the use of approved contractors in the power supply space. Pole owners will be unable to protect their infrastructure if they lose control over the power supply space. The Commission should reject the Proposed Approved Contractor Rules.

A. The Attachers Are Focused on Self-Serving Interests – Elevating Speed-to-Market Over Safety and Reliability.

1. The Attachers' Overreach is Irresponsible.

Despite the fact that the proposed rules would force pole owners to allow approved contractors in the communications space if they fail to meet an unrealistic timeline (clearly a one-sided "win" for attachers beyond the scope of the Act), many attachers do not stop there.

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[165] Since 2008, TWC and Oncor have been working together to try and accommodate both parties' concerns. Again, this is how it should work. Although the people in the field do not control the arguments advanced by the "higher-ups" and lawyers, TWC's folks in Texas have been doing a better job complying with Oncor's process. The Commission should not interfere with this progress.

For example, TWC supports even more "expanded" use of approved contractors.[166] They claim that already overreaching proposed rules would overly-restrict the areas where the contractors should be able to work.[167]

The Commission should exercise great caution in this area. As discussed in Sections II and III above, and in the various Initial Comments filed by pole owners, attachers have consistently demonstrated their disregard for safety and reliability. They have repeatedly proven that if you give them an inch, they will take a mile. Their failure to even acknowledge the prevalence of unauthorized attachments – or worse, their efforts to explain them away with failed excuses – is a perfect indicator of where safety and reliability rank on their scale of priorities.

Not only do attachers want approved contractors to have the ability to work in the power supply space,[168] but they want to ***eliminate any post-inspection*** if the attaching party uses a utility-approved contractor (despite the fact that such contractors would have an inherent conflict of interest).[169] This would completely remove any "checks and balances" from the process. Some attachers want the immediate right to use approved contractors to complete make-ready, even when the pole owner has not yet failed to meet the proposed timelines.[170] In their circular way, they are simply asking for the right to use outside contractors from the outset.[171] The demands do not stop there, however. Level 3 Communications argues that the list of "approved

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166 TWC Initial Comments, p. 21.

167 *Id.* at 22; *see also* Fibertech Initial Comments, pp. 2-5.

168 TWC Initial Comments, pp. 21-22; Fibertech Initial Comments, pp. 2-5; MetroPCS Initial Comments, pp. 14-15.

169 TWC Initial Comments, p. 22.

170 TWTC and Comptel Initial Comments, pp. 11-13.

171 *Id.*

contractors" should be expansive with no utility screens.[172] T-Mobile takes it a step further, arguing that it should not be restricted to using "approved contractors" at all.[173] Finally, Metro PCS makes the disturbing argument that if a wireless carrier uses an authorized contractor for purposes of installing or working with wireless antenna equipment among and above the electrical lines, the electric utility should not be allowed to require any additional personnel or contractors to work with the antenna.[174]

The attachers go too far and their disregard for safety and reliability is transparent. The Commission was correct in its observation that "communications attachers wish to roll out service as quickly as possible, and consequently do not have the same incentives to maintain the safety and reliability of the infrastructure as utilities themselves would."[175]

2. Contractor Approval is Always Subject to Review.

The Commission should not grant attachers the right to use a contractor if the utility used the contractor in the past. Simply because a contractor was once used by Oncor does not mean that the contractor is still qualified to perform work on Oncor's system. For example, Oncor may have discontinued its use of that contractor based on previous poor performance. Moreover, contrary to T-Mobile's recommendation,[176] Oncor should not be forced to allow a third-party to use a contractor simply because that contractor is "approved" or commonly used by another electric utility. What constitutes an "approved contractor" is a utility-specific determination and

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172 Level 3 Communications Initial Comments, p. 12.

173 T-Mobile Initial Comments, pp. 11-13.

174 MetroPCS Initial Comments, p. 15.

175 FNPRM and Order, ¶ 67.

176 T-Mobile Initial Comments, p. 11.

the Commission should not attempt to dictate what credentials are "adequate" for every electric utility.

Moreover, in Oncor's experience, it is important that any contractors working on or near electrical facilities be in communication with Oncor's operations center to address outages that occur during the performance of work.[177] Oncor tracks various crews working to restore planned and unplanned power outages through its dispatch center.[178] If crews – even those approved by another utility – were allowed to work in Oncor's supply space without its approval, oversight and supervision, this could result in severe consequences for both Oncor and the contractors performing the work. The understanding of Oncor's requirements and the relationship of trust that has developed between Oncor and its contractors performing work in the power supply space would be degraded if the Commission required Oncor to allow attachers to hire contractors to perform work in the power supply space. This would have a serious effect on the safety and reliability of Oncor's system.

B. The Commission Lacks Jurisdiction to Mandate Use of Approved Contractors in the Power Supply Space – and It Is a Bad Idea In Any Event.

Some attachers request ***unlimited*** use of approved contractors in both the communications and ***power supply space*** without any pole owner oversight, supervision or input. This is particularly troubling. Communications companies lack the special expertise and skills to design or manage power space work and, therefore, cannot be delegated to oversee the work of contractors in the power supply space. The Commission has acknowledged that electric utilities are tasked with the "responsible management of facilities that are both essential and potentially

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177 Flewharty Decl. at ¶ 6.

178 *Id.*

hazardous."[179] The Commission is right about the potential hazards. They are real and must be respected.

On average, Oncor has approximately five instances each year where a communications contractor contacts an electrical facility when working on Oncor's poles.[180] For example, in 2007, a cable employee made contact with a 120 volt secondary line while trimming vines.[181] In 2009, a telephone company employee made contact when he bored into Oncor's primary line.[182] In that same year, four cable employees made contacts when installing cable.[183] The degree of injury related to these contacts from working near power facilities can vary from a momentary tingling sensation to loss of life. The Commission should not create a regime that allows contractors to take this gamble. The electric utility pole owners must retain control over power space make-ready.

These examples above demonstrate the different risks associated with working in the communications space and in the power supply space. The power supply space contains facilities with voltages capable of taking human life – the communications space does not. As the two situations present very different risks for contractors working on the pole, a universal rule allowing communication contractors to work anywhere on the pole without oversight, supervision or permission of the pole owner would be disastrous. The Commission should reject each of the Proposed Approved Contractor Rules, but those that are interpreted to relate to the

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179 Order and FNPRM, ¶ 67.

180 Flewharty Decl. at ¶ 7.

181 *Id.*

182 *Id.*

183 *Id.*

power supply space (as claimed by a few commenters), if any, would certainly be very bad policy.[184]

At least two attachers acknowledge that the Proposed Approved Contractor Rules should exclude work in the power supply space: "Given that such qualified workers would be working ***only in the communications space and safety space below the area where the electrical lines are located*** on the pole, ***and not among the electric lines themselves***, reliance on such workers should not raise serious safety concerns."[185] However, despite the stark difference in associated risks, some attachers continue to argue that their contractors should have free reign on the pole. For example, Fibertech argues that the Commission should "clarify" that "contractors . . . should be permitted to perform make-ready work on the pole, wherever such work is required."[186] MetroPCS "disagrees with" the Commission "allow[ing] a utility to prohibit the use of contractors for actual installation of equipment in instances in which the installers must work among electrical power lines."[187]

If the Commission presses forward (without regard to its jurisdiction) and adopts rules regarding use of approved contractors, Oncor urges the Commission to at least adopt Modified Proposed Rule 1.1424 as set forth in Oncor's Initial Comments.[188]

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184 As set forth in Oncor's Initial Comments, the Commission lacks jurisdiction to force upon pole owners any approved contractor regime. *See* Oncor Initial Comments, pp. 43-45. As such, doing so to any degree would be bad; doing so with respect to the power supply space would be exponentially worse.

185 TWTC and Comptel Initial Comments, pp. 11-12 (emphasis added).

186 Fibertech Initial Comments, p. 4.

187 MetroPCS Initial Comments, pp. 14-15.

188 Oncor Initial Comments, p. 45. In addition, Oncor supports Alliant's proposal that use of approved contractors should only be allowed in the following circumstances: (1) the electric utility deems there is a need; (2) the electric utility approves the contractor and has an agreement with the contractor containing acceptable terms and conditions; (3) the contractor is frequently used by the electric utility; (4) the contractor is familiar with and agrees to abide by

V. THE INITIAL COMMENTS AMPLIFY THE LACK OF STATUTORY AUTHORITY FOR THE PROPOSED "REINTERPRETATION" OF THE TELECOM RATE.

As Oncor urged in its Initial Comments, along with many other commenters, the Commission's authority is specifically delegated (and limited) by Congress.[189] Logically, therefore, the language of the statute sets the parameters for the actions the Commission may take with regard to the FNPRM and its proposed rules.[190] The Act requires a set rate for "any pole attachment used by a cable television system solely to provide cable service."[191] The Cable Rate, adopted in 1978, served a historical, limited purpose.

The Telecom Rate was enacted by Congress in 1996 to apply to telecommunications carriers and cable television companies providing telecommunications services – as opposed to those providing "solely ... cable service."[192] Congress adopted the Telecom Rate with full knowledge that it would yield a higher rate, based on the manner in which the "costs of providing space . . . other than the usable space" (otherwise known as "unusable space") is

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the electric utility's specific standards; and (5) the electric utility (if necessary) has the opportunity to provide a representative for on-site management. *See* Alliant Energy Initial Comments, pp. 3-4.

189 *See* Oncor Initial Comments, p. 59; *see also* AFPAR Initial Comments, p. 25 ("Section 224 provides specific rights and obligations relating to a narrowly defined category of attachments and gives the Commission limited regulatory authority with respect to such attachments. The Commission has no regulatory authority over pole attachments other than the authority Congress has provided under section 224."); EEI/UTC Initial Comments, pp. 2-3 ("Congress only granted the FCC limited jurisdiction to ensure that the rates, terms and conditions of pole attachments are just and reasonable; it did not authorize the FCC to regulate electric utilities. Thus, the FCC adopted general rules and guidelines rather than detailed requirements in order to implement the Pole Attachment Act and its 1996 amendments. As described below in greater detail, many of the FCC's proposals in the *FNPRM* go well beyond the FCC's statutory authority to regulate the rates, terms and conditions of access.").

190 Oncor Initial Comments, p. 59 n. 247.

191 47 U.S.C. § 224(d).

192 47 U.S.C. § 224(e).

allocated.[193] The Telecom Rate's cost-sharing model was based on the common sense proposition that the unusable space is of "equal benefit to all entities attaching to the pole."[194]

With the 1996 Act, Congress intended that the Cable Rate would be left as a vestige of the past and the new rate model would be based on cost-sharing. Had Congress wanted to simply make the Cable Rate apply to all attachments, it could very easily have done just that (instead of creating an entirely different rate formula). The Commission cannot now "reinterpret" this Congressional mandate and "substitute its judgment" for that of Congress.[195] Nothing in the Initial Comments seeking rate reform explains away the statutory distinction between the two rates, explains how the Commission can simply "blue pencil" the cost sharing principles out of the statute, or justifies the shift in focus away from the "cost" of providing pole ***space*** to the costs of ***attachments*** themselves.

A. The Commission Cannot Re-Write Section 224(e): Congress Set Up A Cost-Sharing Telecom Rate, Not A Cost-Causer Subsidy.

The proposed "reinterpretation" of the Telecom Rate is based on an alleged ambiguity in the statute with respect to the phrase "costs of providing space."[196] Buttressed by this non-existent ambiguity,[197] the FNPRM proposes a "cost causation theory" that focuses on the "costs the attacher causes" as opposed to "the attacher's benefit."[198] This notion has sprung from the assertions of some attaching entities who realize their arguments will not work under the current parameters of the Act. As such, they seek to regulate around the rules, ignore the clear statutory

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193 47 U.S.C. § 224(e)(2).

194 Oncor Initial Comments, p. 61 n. 255.

195 *Id.* at p. 60 (citing *Brown & Williamson Tobacco Corp.*, 153 F.3d 155, 161 (4th Cir. 1998)).

196 Order and FNPRM, ¶ 130.

197 *See* Oncor's Initial Comments, pp. 59-62.

198 Order and FNPRM, ¶ 135.

language and change the paradigm. Apparently, their strategy is to say "cost causer" enough that the Commission will forget that the Act requires "cost sharing." The Commission must retain focus on the Act and reject the regulatory sleight of hand articulated in the comments filed by those seeking Telecom Rate reform. Section 224(e) sets up a ***cost-sharing*** model – not a rigid and narrowly crafted ***cost-causer*** model.

With respect to poles that do not require make-ready in order to accommodate an additional attachment, which the record makes clear is the majority of the poles subject to most permit requests, some attachers assert that the "marginal" costs are zero. In essence, they argue that the pole owner should not be entitled to any rent at all. Of course, they fail to explain how this squares with Section 224(e) which clearly anticipates a rental payment being made for every attachment; a payment that must include not just the space occupied, but also an allocation for the unusable space that provides the attacher with the convenient elevated corridor. Again, this latter component is driven by Congress' recognition of "benefit" to the attacher – a concept the attachers attempt to simply erase with their "cost causer" theory.

As for those poles that require make-ready, the attachers get even more creative. They argue that recovery of the charges associated with that episodic make-ready provide full compensation for all marginal pole costs. The flaw, however, is that this measure of cost causation is pole specific and is associated only with the cost of preparing that particular pole to be occupied. It has nothing to do with the historical "sunk" costs associated with providing the other poles in the line to which they will attach and nothing to do with the benefit the attacher obtains from occupying all poles to which they are attached in perpetuity (in an elevated position). The Telecom Rate's focus on the costs associate with both the usable and unusable

space on the pole cannot be "reinterpreted" to erase those very costs.[199] As such, the make-ready focused cost-causer model does not comport with the Act and must be rejected.

B. The Act Focuses on the "Costs of Providing" Usable and Unusable Pole Space – Not the Costs of "Attachments."

Perhaps the greatest mischief in the "cost causer" theory is the, somewhat subtle, effort to fundamentally change the statutory focus from the "costs of providing ***space***" (usable and unusable) to the costs associated with individual ***attachments***.[200]

Neither subsection (2) nor (3) of Section 224(e) includes the word "attachment." All of the costs of providing space on a pole must be included – not just the costs associated with an individual attachment. Congress expressly de-coupled such a narrow "attachment" cost focus when it rejected § 224(d)'s "additional costs of providing pole attachments" language when formulating the Telecom Rate. Congress' mandate with respect to the Telecom Rate is unambiguous and wholly inconsistent with cost-causation principles. Neither the National Broadband Plan, the FNPRM nor any of the Initial Comments can change the plain language of the Act.[201]

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199 47 U.S.C. § 224(e)(2) and (e)(3).

200 *See, e.g.,* Comcast Initial Comments, p. ii ("The Commission's proposal to establish a lower bound telecommunications pole attachment rate by eliminating the capital components of the carrying charge (i.e., depreciation, rate of return and taxes) is supported by sound economic theory as well as by the language and intent of Section 224(e). As economic valuation expert Timothy Pecaro explains, Section 224(e)'s directive for the Commission to assign the "cost of providing pole space" need not include any capital component, but instead requires only inclusion of a share of maintenance and administrative costs arising from the provision of pole space to attachers. This is consistent with fundamental cost causation principles and Congress' recognition that pole attachments generally cause no capital costs to utilities that are not already recovered in make-ready."); Qwest Initial Comments, p. 16 ("Thus, the easiest and most straightforward way to address these rate disparities is to move to a single rate for pole attachments that is based on the amount of space occupied within the communications space on the pole, to the extent permitted by Section 224.").

201 *See* Oncor Initial Comments, pp. 58-65.

For more than a decade, the Commission has accepted and followed the Act's explicit structure by applying the Telecom Rate in a manner which recognizes that the fully allocated rate: (1) is different than the Cable Rate; (2) must be higher than an incremental (cost-caused) rate; and (3) includes "operating expenses and capital costs" (taking into account both usable and unusable space). Nothing in the Initial Comments explains why this approach should change or – more importantly – ***how*** this approach can change and remain consistent with the Act.

VI. CONCLUSION

Oncor appreciates the opportunity to comment on these critical matters, and to provide the Commission with insight into Oncor's current practices and concerns regarding the FNPRM's Proposed Rules. Oncor urges the Commission to strike the right balance. As the bulk of Initial Comments establish, many of the FNPRM's Proposed Rules: (1) are outside the Commission's statutory authority; (2) attempt to fix a problem that does not exist; (3) are inconsistent with an electric utility's right to deny access pursuant to 47 U.S.C. § 224(f)(2); and (4) would impede pole owners' ability to maintain safe and reliable networks and meet state-imposed obligations as electric service providers.

As previously stated, Oncor supports the Commission's intent to encourage further broadband deployment. Broadband deployment must yield, however, to the pole owners' focus on maintaining safe and reliable electric distribution networks. The Proposed Make-Ready/Access Rules (1.1420, 1.1424, 1.1426(b)(1)–(3) and 1.1428) and the Proposed Approved Contractor Rules (1.1402, 1.1422 and 1.1424) present substantial risks to the safety and reliability of Oncor's system and its ability to meet the obligations established by the Pubic Utilities Commission of Texas. These Proposed Rules should be rejected.

Respectfully submitted,

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October 4, 2010

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C., 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
A National Broadband Plan for Our Future	)	**GN Docket No. 09-51**
	)	
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DECLARATION OF KAREN FLEWHARTY

1. My name is Karen Flewharty. I am currently employed by Oncor Electric Delivery Company LLC ("Oncor") as Joint Use Manager. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Joint Use Manager for Oncor.

2. My declaration addresses certain issues impacting the safety and reliability of Oncor's distribution system. I offer this testimony in support of the Reply Comments filed by Oncor in response to the Further Notice of Proposed Rulemaking (*Implementation of Section 224 of the Act; A National Broadband Plan for our Future; Proposed Rule*, WC Docket No. 07-245, GN Docket No. 09-51 (July 15, 2010)).

3. The background information and data set forth in my previous declaration submitted as part of Oncor's Initial Comments on August 16, 2010 remains accurate. I incorporate my previous declaration as if set forth fully herein.

Access/Make-Ready Process

4. In Oncor's experience, attachers are granted access and make-ready is performed in a timely manner.

5. From April 24, 2008 to May 29, 2008, TWC submitted 1,858 poles for permitting. Oncor averaged 40.5 days for processing (the date a permit is received up to the date Oncor sends a cost letter to attacher). Similarly, as part of TWC's cell tower backhaul projects, from July 3, 2008 to August 16, 2010, TWC submitted 19,430 poles for permitting. Oncor averaged 30 days for processing during the 2008 and 2009 timeframe. From January 1, 2010 to August 31, 2010, TWC submitted 3,474 poles for permitting. Oncor averaged 39 days for processing. Collectively, from January 1, 2010 to August 31, 2010, Oncor received 14,836 poles for permitting. Oncor has averaged 39 days for processing during this timeframe.

Use of Approved Contractors

6. In Oncor's experience, it is important that any contractors working on or near electrical facilities be in communication with Oncor's operations center to address outages that occur during the performance of work. Oncor tracks various crews working to restore planned and unplanned power outages through its dispatch center.

7. On average, Oncor has approximately five instances each year where a communications contractor contacts an electrical facility when working on Oncor's poles. For example, in 2007, a cable employee made contact with a 120 volt secondary line while trimming vines. In 2009, a telephone company employee made contact when he bored into Oncor's primary line. In that same year, four cable employees made contacts when installing cable.

Unauthorized Attachments

8. Oncor's data demonstrates that attachers frequently make unauthorized attachments. Charter alone had 1,668 unpermitted attachments from 2003 to 2008. By contrast, Oncor received only 102 attachment permits from Charter during that same time.

9. In Oncor's experience, disputes regarding the number of unauthorized attachments are often the result of attachers: (1) making unauthorized attachments instead of complying with the permitting process; (2) transferring, assigning or purchasing facilities without complying with the contractually required processes; and (3) failing to provide contractually required notice of removal of attachments.

10. The condition of Oncor's poles constantly changes based on many factors, including additional foreign attachments, unauthorized attachments, removal of attachments, etc. Field surveys are necessary to determine the availability of pole space and to locate unauthorized attachments. Oncor monitors the status of its poles and the compliance of attachments on its poles through its pole inventories, counts and audits. In advance of any such exercise, Oncor invites and encourages the participation of all attachers. Oncor explains the process and invites attacher input. Oncor's experience is that few attachers choose to participate. If attachers would participate in the audits, many of the post-audit issues could likely be resolved in the field real time.

11. Oncor makes every reasonable effort to maintain accurate and reliable records based on the data gathered by its pole inventories, counts and audits, as well as the data provided by its attachers. To account for typical errors which could be made in the pole count process, before the process starts, the parties discuss and agree upon a deviation percentage allowance to be applied, *i.e.* a set percentage of unauthorized attachments for which the third-party is not required to pay. If a problem is identified, Oncor works with the attacher and the final numbers are adjusted if necessary.

12. Regarding the definition of attachment, Oncor's negotiated agreements define "equipment" to include a service drop attachment:

> the equipment, including appurtenances, attached by or on behalf of Licensee to any Pole. Such equipment shall include, without limitation, fiber optic or other cables, amplifiers, wires (including Service Drops), and appliances, together with associated cable messengers and anchors, as well as radios, antennas, cameras, and other wireless equipment.

13. Oncor does not require a permit before a service drop is attached. Instead, Oncor requires notification after a service drop is made:

> Notwithstanding the requirements of Section 4.1, Licensee may attach a Service Drop to any Pole without first submitting a Permit Application requesting such attachment; provided, however, that Licensee shall notify Oncor Electric Delivery within fifteen (15) days after Licensee makes such attachment. Licensee shall thereafter notify Oncor Electric Delivery within fifteen (15) days after Licensee makes any change to a Service Drop previously attached to any Pole, as more fully described in the Permit Application. Within thirty (30) days of receiving any such notice, Oncor Electric Delivery may, at Licensee's sole cost, inspect the Service Drop, for the purpose of confirming that such attachment is in compliance with the Standards. In the event that Oncor Electric Delivery (or, as appropriate, a Oncor Electric Delivery Representative) determines that such attachment is not in compliance with the Standards, Licensee shall, at its sole cost, promptly correct any condition of such attachment, as necessary to ensure that such attachment is in compliance with the Standards.

Overlashing

14. Oncor's agreements require notice prior to overlashing. However, some attachers fail to provide notice. In 2008, after Oncor discovered a TWC contractor overlashing on a pole with a preexisting NESC violation in the power supply space, TWC notified Oncor of several projects where TWC had overlashed without providing prior notice.

15. After receiving notice of the overlashing, Oncor post-inspected 3,015 poles on which TWC had overlashed in violation of the pole license agreement. Oncor found 497 violations (a violation rate of over 16%). Approximately 180 poles (approximately 6%) had existing violations in the power space. Other types of common violations found during the post-inspection process included: missing ID tag, improper communication zone spacing, boxing of

pole, use of J Hook for permanent attachment, anchor not installed, floating attachment, and inadequate ground clearance.

16. Oncor's standard pre-inspection process typically identifies 25%-30% of poles requiring some type of make-ready to cure violations prior to attachment/overlashing. As a result, the number of post-inspection violations is negligible. In contrast, 497 violations (16.5% of the total poles inspected) were found during the post-inspection of TWC's overlashing projects.

17. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on this 4th day of October 2010

Karen Flewharty

Karen Flewharty
Joint Use Manager
Oncor Electric Delivery Company LLC